IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1943.

No. .....

FRED SCHROEPFER, CHARLES R. SCHROEPFER AND ABRAHAM BERRY,

Petitioners,

VS.

THE A. S. ABELL COMPANY, INC.,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS BELOW.

The opinion of the United States District Court for the District of Maryland is printed in 48 F. Supp. 88, and the opinion of the United States Circuit Court of Appeals for the Fourth Circuit is reported in 138 F. (2d) 111. The opinions are also reported in full in the record (R.).

JURISDICTION.

The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347). The Circuit Court of Appeals has in this case "decided a federal question in a way probably in conflict with applicable decisions of this Court" (Supreme Court Rule 38, par. (5) (b)), and the District Court "decided an important question of federal law which has not been but should be settled by this Court" and which the Circuit Court of Appeals has left open (Supreme Court Rule 38, par. (5) (b)). Judgment was entered in this case by the United States Circuit Court of Appeals on September 16, 1943 (R.).

STATEMENT OF THE CASE.

There are no controverted issues of fact in this case relative to the question of interstate commerce, and the facts are summarized above in the petition. There is divergence in the testimony on the issue of employer-employee relationship, but the facts supported by the great weight of evidence are as follows:

A. The Rackman's Duties.

The rackmen, or substitutes on occasion, were required to report at 3:30 each morning to receive papers for distribution. The company determined the number of papers each rackman received and each rackman had a definite territory, and he was required to solicit all the stores and service all the racks in his territory. The rackmen were also required to place advertising on the racks to facilitate sales, including special ads to promote carrier sales, the furtherance of which, as will be seen, diminished the rackmen's earnings (Tr. 42, 64, 77, 203, 204).

At 7:45 A. M. the racks were rechecked; at 9:15 A. M. the rackmen reported back to the office to turn in cash, to make up store sheets (showing the name and address of each store and the amount of each edition received by the store), and sometimes to attend rackmen meetings called by the company. At 10:15 A. M. the rackmen started to distribute the first edition of the evening paper. They brought their returns in about 12:30 P. M., ate lunch, and then from 2 P. M. to about 7 P. M. were kept continually busy with the several evening editions. On Sundays from 8 to 11 A. M. rackmen distributed only to stores and not to racks. On Mondays they made collections of cash and unsold papers; if their returns were not in by 10 A. M. Monday no credit was given (Tr. 47, 70, 71).

If the rackmen were unable to keep up this schedule of 72 hours or more per week, they were permitted to send a substitute on occasion. However, they could not assign or sell the route to anyone else, and they could not carry the papers of any other company (Tr. 114, 86, 316).

B. The Rackman's Earnings.

The rackmen's two principal sources of income were the weekly "salary" or "car allowance" and the difference between the amounts they were charged for papers and the sum they received from the sales through the racks. When the rackman system was instituted, the racks were "open" and losses through nonpayment were very great. The rackman was then paid a salary of $18 a week with a "car allowance" of $15, or $33 in all in addition to whatever he might earn through the racks. He was, however, required to furnish his own car and pay expenses on it. Shortly thereafter, a "closed" rack was

adopted and the rackman's salary was reduced to $25 because his losses from theft were reduced. Officials of respondent testified that they had viewed the $25 as "car allowance," although until May 1941 they had "inadvertently" used the term "salary" when paying the rackmen. When the rackman's car broke down, the company furnished a car, and the "salary" or "allowance" was reduced in that the company charged 70 cents per trip. An additional $3 "car allowance" was paid for the work connected with the Sunday papers (Tr. 25, 39, 162, 97, 70, 387).

Like other employees, the rackmen received a bonus when they left the company's service on the abandonment of the rack system by respondent. The bonus given the rackmen was $112, which was "four weeks' salary" ($4 \times \$25 + 4 \times \$3$) as the respondent's assistant business manager put it (Tr. 125), or four weeks' "car allowance" as respondents have termed it in this litigation. The balance of the rackman's earnings was derived from the difference between the amount he was charged for the papers placed in the racks and the amount received from their sale (Tr. 28, 42-43). He was allowed a credit on the papers he returned from the racks (Tr. 183) and thus made about one cent per paper (Tr. 28). This was not true of the Sunday papers on which he earned nothing since there was no rack distribution and the charge to the stores was the same as that to the rackmen (Tr. 366). Some of the rackmen who had been engaged for a longer period received "increases" in "car allowance" (Tr. 389).

In addition to car expenses, the rackman paid his helper and also paid sums varying from $2 to $7 a week for "rack rental" (Tr. 62). He also paid insurance on

the car, although for some time each insurance policy carried the name of the respondent as insured, as well as that of the rackman. Respondent's witnesses testified that insurance coverage was required of the rackmen to protect the company from damage suits occasioned by the rackmen's auto accidents (Tr. 192, 229). The rackmen paid the insurance premiums to one of the respondent's officials who in turn paid the insurer. Respondent's officials testified that this was done merely as a convenience to the rackmen (Tr. 233, 343). The rackmen also had to stand the loss from stolen or damaged papers, and had to keep the racks clean and make minor repairs (Tr. 63).

Petitioners' evidence as to their hours of work was not contradicted; respondent does not assert that it met the standards of the Act.

C. Control Over the Rackman.

As indicated above, the rackmen were required to report at the respondent's office at an hour specified by respondent, where they punched a time clock (Tr. 46) and then received the number of papers specified by respondent (Tr. 265) (occasionally exercising a limited degree of discretion in this respect) (Tr. 260) for distribution to the places designated by respondent (Tr. 76-77). In addition, they were required to place advertising placards on the racks. Sometimes these placards advertised the carrier service, which was a cheaper way of obtaining the paper than through the racks (Tr. 63-69). Other placards advertised special features, such as foreign correspondents' dispatches or World Series baseball coverage (Tr. 72-73). In 1941 the company, over the protest of the men, made the rackmen serve an additional edition to the racks without additional

compensation (Tr. 353-4). The rackmen occasionally protested the conditions of their work, particularly with respect to the Sunday duties for which they received only a "car allowance" (Tr. 81), and with respect to the placard advertising carrier service (Tr. 303, 354). However, the rackmen testified that they were threatened with discharge if they failed in those duties. At least one rackman was discharged for failure to keep placards on the racks (Tr. 67) and others were threatened with dismissal and discipline for various other "offenses" (Tr. 69, 80). "If a man began returning too many papers in his returns . . . he was told in plain English to take a little interest in his route, or get out" (Tr. 29). Full credit was not allowed on returns if—in the judgment of respondent's circulation manager—they were too heavy (Tr. 75, 243).

Supervisory officials occasionally followed the rackmen to check whether they were properly servicing the racks (Tr. 103). They were also checked as against their sales of the previous week and corresponding week in the previous year, and were under pressure to keep their sales up to these levels (Tr. 352). Meetings of the rackmen were called by the respondent (Tr. 47, 313). Respondent fixed the price of the papers in the stores and racks (Tr. 95); the rackmen had no control over that and none over the "wholesale price" charged them. Respondent owned the racks and fixed their location and number.

In June 1941 the rackmen joined the American Newspaper Guild (an affiliate of the C. I. O.) and were thereafter asked to sign individual contracts with the respondent (Tr. 32). This they refused to do because of a union rule against individual bargaining (Tr. 88-90). The

respondent refused to treat them as employees, insisting that they were "independent contractors," although in a book written by leading officers of respondent in 1937, the petitioners rackmen were listed as employees (Tr. 93).

D. The Rackman's Helper.

Petitioner Berry, in addition to being employed one night a week by respondent in loading and stuffing papers (Tr. 141), was also engaged as a rackman's helper, with working hours similar to those of the rackmen (Tr. 139). He received his remuneration directly from the rackmen with whom he worked, but respondent was aware that the rackmen had to have helpers to assist them "as it would be impossible to make deliveries by yourself and get along the territory in time" (Tr. 34-5).

ERRORS RELIED UPON.

1. The Circuit Court of Appeals erred in holding that petitioners were not engaged in commerce within the meaning of the Fair Labor Standards Act. The movement of intelligence or information across state lines is interstate commerce, and has been frequently so held in decisions of this Court. Petitioners' work was an integral part of the interstate gathering and distribution of news in which respondent is engaged, for the process which begins with the collection of news, admittedly an interstate activity, is continuous and does not end until the paper is placed in the hands of the customer or reader. The Circuit Court of Appeals attempts to overcome the force of this argument by making a distinction between "news" and "newspapers", and although it concedes that if the petitioners distributed news as such locally, they would be engaged in commerce, it distin-

guishes the present case because the news is put in written form and printed on paper stock before it is distributed by petitioners. The illusory character of this alleged distinction is revealed by the Court's own admission that "it is news, of course, that makes the papers valuable", i. e., an article of commerce.

2. The Circuit Court of Appeals likewise erred in holding that news reports, paper stock, etc., are raw materials for an entirely new product, a newspaper, created in the publishing office of the company, in the same sense as a sausage (to use the Court's example) is made of various meat products, seasoning and other ingredients. The greater number of items in a metropolitan newspaper, such as news dispatches and feature articles, and many of the advertisements, appear in the final product unchanged, just as they are received by the publisher, and they are distributed to the consumer in the identical form they possessed before crossing state boundaries; and in no manner can a new product be said to be created in the compiling of a newspaper in the sense that an automobile, or even a sausage, is a product different from the component ingredients. Indeed, certain items, such as the Sunday rotogravure and magazine sections are printed in their entirety outside of the state and are distributed locally (in combination with the rest of the paper) without even an alteration in the spatial arrangement of the items.

3. The District Court erred in holding that the petitioners were not employees of the respondent; and the Circuit Court of Appeals, by failing to make a finding on this issue, permitted to stand a decision which unduly limits the scope of the Fair Labor Standards Act, and is an open invitation to evasion of its provisions.

ARGUMENT.

I.

Petitioners Were Engaged In Commerce Within the Meaning of the Act.

Respondent concedes that it is engaged in interstate commerce within the meaning of the Fair Labor Standards Act, but denies that petitioners are so engaged because they were employed solely in the local distribution of newspapers from the respondent's establishment to local dealers and to the news racks. However, it is not necessary that an employee actually work across state boundaries for his employment to be "in commerce."

In *Overstreet v. North Shore Corp.*, 318 U. S. 125, this Court held that employees maintaining or operating a toll road and a drawbridge over a navigable waterway, which together constitute a medium for the interstate movement of goods and persons, are "engaged in commerce" within the meaning of Sections 6 and 7 of the Act. One of the employees operated the drawbridge, the second did maintenance and repair work, and the third sold and collected toll tickets. The Court held all three employees protected by the Act, saying:

> "The operational and maintenance activities of petitioners are vital to the proper functioning of the structures as instrumentalities of interstate commerce. The services of Overstreet are necessary to prevent the drawbridge from being either a barrier to interstate navigation or else a gap in the vehicular way. Without the services of Brazle the facilities would fall into disrepair, and both operation and maintenance would seem to depend upon Garvan's collecting the toll from users of the structure. The work of each petitioner in providing a means

of interstate transportation and communication is so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it' . . . and justifies regarding petitioners as 'engaged in commerce' within the meaning of the Fair Labor Standards Act.

". . . We see no persuasive reason why the scope of employed or engaged 'in commerce' laid down in the *Pedersen* and related cases, cited above, should not be applied to the similar language in the Fair Labor Standards Act, especially when Congress in adopting the phrase 'engaged in commerce' had those Federal Employers' Liability Act cases brought to its attention." pp. 131-32.

"Petitioners, who are engaged in operating and maintaining respondent's facilities so that there may be interstate passage of persons and goods over them, are so closely related to that interstate movement as a practical matter that we think they must be regarded, under the allegations of their complaint, as 'engaged in commerce' within the meaning of Secs. 6 and 7 of the Act." p. 132.

And in *Pedersen v. J. F. Fitzgerald Co.*, 318 U. S. 740, this Court held in a *per curiam* opinion that employees of an independent contractor constructing new abutments and repairing superstructures to bridges used by an interstate railroad, were engaged in commerce and were entitled to maintain an action under the Fair Labor Standards Act.

Respondent's business must be conceived in large as the gathering and editing of news, soliciting of advertising, assembling and printing, and distributing. It is the sum of these activities that constitutes the interstate business of respondent. Petitioners' work of distribution was a link in the transmission of the news from

world-wide sources to the ultimate reader. It is unquestionably true that if the distribution of the paper were suddenly stopped, the very life of respondent's business would be jeopardized, and this would mean the virtual destruction of the news-gathering, advertising-soliciting, supplying of raw materials, and all the other operations of respondent transcending state boundaries. It is clear, therefore, that petitioners' work is "in commerce" within the broad definition laid down by this Court.

That the commerce in the present case is largely unidirectional is of no significance. Moreover, if commerce exists and the employment of a particular employee plays an important role in the traffic, he is engaged in commerce even though his own work does not transcend state boundaries. Distribution of the completed newspaper, being the ultimate step in the publishing process, is an activity in interstate commerce.

If the distribution of the papers is seen in its true perspective as the final step in the unitary news-gathering-assembling-editing-and-distributing process, petitioners' activity cannot be sheared off from the work of the rest of respondent's employees and considered purely local in character. To sever this stage arbitrarily from what precedes it would be to disregard entirely the primary function of a modern newspaper, which is to bring news from the "four corners" of the earth to the reader.

In *Hearst Publications, et al., v. National Labor Relations Board*, 136 F. (2d) 608, 610 (9 C. C. A., 1943, certiorari granted, — U. S. —), the Circuit Court of Appeals for the Ninth Circuit held that the work of newsboys doing work not dissimilar to that of petitioners, not only *affected* commerce but was *in* commerce:

> "It seems clear that the very considerable factor of street sales in connection with the interstate business being carried on by each of the newspapers concerned herein cannot be separated from other phases of such business so as to distinguish this factor as intrastate business and some other factor as interstate business."

In our view, the interstate commerce in news of respondent is closely analogous to the interstate activity of a carrier of goods; and just as the workers in the *Overstreet* and *Pedersen* cases were held to be engaged in commerce, so the work of distribution by petitioners is an essential activity in respondent's interstate commerce in news.

Petitioners are also engaged in interstate commerce because their activity is part of the continuous interstate movement of news from the point of its inception to the point at which it becomes available to the reading public, that being "the point where the parties originally intended that the movement should finally end." (*Western Union Telegraph Co. v. Foster*, 247 U. S. 105.)

It is established by decisions of this Court that the movement of intelligence or information across state lines is interstate commerce. *Associated Press v. National Labor Relations Board*, 301 U. S. 103; *Western Union Telegraph Company v. Foster*, 247 U. S. 105; *International Textbook Company v. Pigg*, 217 U. S. 91; *Pensacola Telegraph Company v. Western Union Telegraph Company*, 96 U. S. 19. And this Court squarely held in *Western Union Telegraph Company v. Foster, supra*, that the interstate commerce continues until the destination of the news is reached, notwithstanding the fact that there is a wholly intrastate distribution after a

change in the form of transmission. In that case the New York Stock Exchange furnished to Western Union quotations of prices in transactions upon the Exchange. Western Union transmitted this information in code form from New York to its station in Boston, where it was translated from Morse Code into English, and thence transmitted by an operator to tickers in the offices of the various brokers who subscribed for the service. The State of Massachusetts through its public service commission sought to regulate the transmission from Western Union's Boston office to the Boston brokerage offices. The question presented was whether the local transmission of the stock exchange prices from the station in Boston, to the brokerage offices located in the same city, was interstate commerce. Speaking for a unanimous court, Mr. Justice Holmes said (p. 113):

> "Neither the intervention of an operator, or of another company, are in the least degree conclusive. Unlike the case of breaking bulk for subsequently determined retail sales, in these the ultimate recipients are determined before the message starts and have been accepted as the contemplated recipients by the Exchange. It does not matter if they have no contract with the Exchange, directly. . . . It is enough that in our opinion transmission of the quotations did not lose its character of interstate commerce until it was completed in the brokers' offices and that the interference with it was of a kind not permitted to the States. . . . If the normal contemplated and followed course is a transmission as continuous and rapid as science can make it from exchange to brokers' office it does not matter what are the stages or how little they are secured by covenant or bond.
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> "Practice, intent, and the typical course, not title or niceties of form, were recognized as determining

> its character (of interstate commerce). . . . It is admitted that the transmission from New York to Massachusetts by the Telegraph Company was interstate commerce. If so it continued until it reached 'the point where the parties originally intended that the movement should finally end.' "

The decision in the *Western Union* case, upon facts closely resembling those in the instant case, establishes that interstate commerce did not stop at respondent's newspaper plant. The applicability of the decision to the case at bar is demonstrated by this Court's recent announcement of similar principles in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, which arose under the Fair Labor Standards Act. In the *Jacksonville* case, this Court held that goods shipped from outside the State remain in interstate commerce until they reached their final destination and do not necessarily terminate their journey upon their first pause within the State of destination (p. 568):

> ". . . The entry of goods into the warehouse interrupts but does not necessarily terminate their interstate journey. A temporary pause in their transit does not mean that they are no longer 'in commerce' within the meaning of the Act. As in the case of an agency . . . *if the halt in the movement of the goods is a convenient intermediate step in the process of getting them to their final destinations, they remain 'in commerce' until they reach those points.* Then there is a practical continuity of movement of the goods until they reach the customers for whom they are intended." (Italics supplied.)

In the *Jacksonville* case, which dealt with a wholesaler's warehouse, the Court held that interstate com-

merce continued beyond the warehouse to the final destinations of the goods. Where the distribution within the state was made pursuant to prior orders, pre-existing contracts or understandings with the customers, or in anticipation of the needs of specific customers, the interstate journey did not end until the goods were delivered to the customers. In this connection, the Court stated (p. 569):

> ". . . The fact that respondent may treat the goods as stock in trade or the circumstance that title to the goods passes to respondent on the intermediate delivery does not mean that the interstate journey ends at the warehouse. The contract or understanding pursuant to which goods are ordered, like a special order, indicates where it was intended that the interstate movement should terminate."

Translated into terms of the case at bar, the test set forth in the *Jacksonville* case is, did the intelligence or information which was wired across State lines into respondent's newspaper office and there transferred with all possible speed to the racks and stores enjoy a practical continuity in transit or was it acquired and held at the editorial office of The Baltimore Sun as goods are held by a local merchant for local disposition? And the answer to this question should be made in the light of this Court's admonition that "Commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business." *Swift & Co. v. United States*, 196 U. S. 375, 398, quoted with respect to this Act in *Walling v. Jacksonville Paper Co.*, 317 U. S. 564, 570.

In the *Jacksonville* case the Court stated that if extra-state goods had a specific local destination, the goods enjoyed a *practical* continuity in transit so as to render

their distribution from a local warehouse an activity in interstate commerce. In the instant case, the matter of handling the news demonstrates that there was *actual* continuity in transit; the transmission was "as continuous and rapid as science can make it." (*Western Union Telegraph Co. v. Foster*, 247 U. S. at 113.) But the facts of this case also indicate that there was a "practical continuity" in the sense that that phrase was used in the *Jacksonville* case. The intelligence or information when it began its interstate journey was not destined to stop at the newspaper plant, but instead was intended to move immediately to the racks, and to the stores and other places which had standing orders or their equivalent with respondent.

Nor is it significant that the intelligence here was altered in form or appearance at the plant. *Western Union Telegraph Co. v. Foster, supra.* In *Southern Pac. Terminal Co. v. Interstate Commerce Comm.*, 219 U. S. 498, the Court indicated that processing operations did not interrupt the flow of commerce if the goods were intended for specific destinations so as to enjoy what in *Jacksonville* is termed a "practical continuity of movement". In the *Southern Pacific* case, cottonseed cake was brought from without the State and shipped to Galveston, Texas, where it was processed into meal and then shipped to foreign ports which had previously ordered it. In answer to the contention that the interstate commerce ended in Galveston where the cake was processed into meal, the Court said (p. 526):

> ". . . the manufacture or concentration on the wharves of the terminal company are but incidents . . . in the transshipment of the products in export trade."

In *Caldwell v. North Carolina*, 187 U. S. 622, a Chicago company shipped to itself at Greensboro, N. C., pictures and frames in separate boxes. When they reached Greensboro, Caldwell, the company's agent, received the boxes from the railroad at its depot, carried them to his room, opened the boxes, took out the pictures and picture frames, assorted them and put them together, and delivered them to the purchasers in Greensboro. This Court held that the whole transaction was interstate until the actual delivery to the purchaser.

The intelligence or information which forms a subject of commerce enjoyed both an actual continuity of movement through respondent's plant to the newsstands and racks, and also a "practical continuity" of movement in that it was intended for immediate transmission to the stores (which had standing orders) and to the racks controlled by respondent. Petitioners were fully as much a part of that movement as were employees receiving news off the wires. Petitioners were therefore engaged in commerce within the meaning of the Act.

II.

1. Petitioners, Fred and Charles Schroepfer, Were Employees Of Respondent.

The Fair Labor Standards Act gives the broadest possible definition of the employer-employee relationship. Sec. 3 of the Act reads in part: "(e) 'Employee' includes any individual employed by an employer; (g) 'Employ' includes to suffer or permit to work".

In view of the facts which we have detailed at some length, it is evident that the rackmen were employees of respondent and not independent contractors. In summary it appears that the rackmen were limited in the

route where their work was done and the respondent reserved the right to, and did on occasion, take away busy racks from their routes and gave the "points" to newsboys; the rackmen were permitted to distribute respondent's papers only and were not allowed to assign or sell their routes; the sales price of the papers was fixed by the respondent; their hours of work were determined by the respondent in regulating the time of its various editions, as the men were expected to be on hand when the papers came off the presses and they had to punch a time clock when reporting in the morning; the number of papers allotted to the men were in the control of the respondent; their returns were limited by the Circulation Department; they were supervised in the manner of servicing the racks and were required to attend meetings at which they were asked by the Circulation Manager what "they were doing and thinking about" and were given "pep talks" on the value of advertising; they were compelled to put up advertising cards in the racks, even those promoting carrier service to their own detriment; they were required at their expense to insure respondent against liability due to the negligent operation of their automobile; they were compelled to make minor repairs to racks; they were threatened with discharge for breaches of discipline; they had to distribute Sunday papers for a fixed compensation estimated to cover little more than the cost of operation of their automobiles; they were required to solicit all stores in their routes, although it was uncontradicted that the compensation allowed for such "sales" was inadequate; in 1941 additional editions were put out and the men were required to make additional trips without extra compensation; the respondent exercised further control over the earnings of the men by varying the rack

rental in its arbitrary discretion. And if respondent's own testimony is to be accepted, the amount allowed the men for car expense was also fixed by respondent. Furthermore, the respondent, through certain of its high-ranking officials described the petitioners as employees in a book written by them under the title "The Sunpapers of Baltimore".

A practical approach to the problem presented here is illustrated in *Singer Mfg. Co. v. Rahn*, 132 U. S. 518; in Chief Judge (later Mr. Justice) Cardozo's opinion in *Glielmi v. Netherland Dairy Co.*, 254 N. Y. 60, 171 N. E. 906; and in the opinion of Judge Learned Hand in *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 552-553 (C. C. A. 2), certiorari denied, 235 U. S. 705. The standards set forth in these cases support the view that both the rackmen and the helper here are respondent's employees. Formal or technical concepts must yield to the actual conditions of the relation. Where the worker "is bound hand and foot as long as he works the route at all, his freedom an illusion, and his independence but a name" (*Glielmi* case, 171 N. E. at 907), no formal agreement, however "adroitly framed to suggest a different relation" (ibid.) can repudiate the responsibilities of the employment relationship.

Moreover, we are concerned here not with the existence or nonexistence of a common law employer-employee relationship, but rather with the practical application of a statutory definition in the light of the purposes of the statute. This Court recently noted that the term "employee" is not a "word of art" but one which "takes color from its surroundings and frequently is carefully defined by the statute where it appears." *United States v. American Trucking Assns.*, 310 U. S.

534, 545. It is our position that the definitions set forth in the Act expand the concept of the employment relation beyond that embraced in the common-law concept of master and servant. "The Act is a remedial one and must be liberally construed . . ." The definition of " 'employ' . . . is very broad . . ." *Fleming v. Palmer*, 123 F. (2d) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 662.

> "We are dealing here not with private rights . . . nor with technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants but with a clear legislative policy . . . *International A. of M. v. National Labor Relations Board*, 311 U. S. 72, 80.

The words of the statute "must be understood with reference to the purpose of the Act, and where all the conditions of the relation require protection, protection ought to be given." *Lehigh Valley Coal Co. v. Yensavage*, 218 Fed. 547, 552-553 (C. C. A. 2), certiorari denied, 235 U. S. 705. Since, as has been demonstrated above, the petitioners were employees of respondent under the principles of common law, it follows that they were employees within the broader concept adopted in the definition of the Act.

Section 3, the definitional clause of the Act, provides in subsection (e) that " 'employee' includes any individual employed by an employer" and in subsection (g) that " 'employ' includes to suffer or permit to work." When Congress adopted this definition—which Senator (now Mr. Justice) Black called "the broadest definition that has ever been included in any one act" (81 Cong. Rec. 7657)—it selected terms to which previous judicial decisions had given broad scope. *Curtis & Cartside Co.*

v. Pigg, 39 Okla, 31, 134 Pac. 1125 (1913); *Purtell v. Philadelphia & Reading Coal & Iron Co.*, 256 Ill. 110, 99 N. E. 899 (1912); *People ex rel, Price v. Sheffield Farms-Slawson-Decker Co.*, 225 N. Y. 25, 121 N. E. 474 (1918); *Chattanooga Implement & Mfg. Co. v. Harland*, 146 Tenn. 85, 239 S. W. 421 (1922); *Commonwealth v. Hong*, 261 Mass. 226, 158 N. E. 759 (1927); *Buffalo Steel Co. v. Aetna Life Ins. Co.*, 136 N. Y. Supp. 977, 983 (1915); *Grcham v. Goodwin*, 170 Miss. 896, 156 So. 513, 514 (1934).

The identical language used in the Act to define "employ" has been minutely analyzed and interpreted in numerous decisions. The opinion of the court in the case of *Curtis & Gartside Co. v. Pigg*, 39 Okla. 31, 134 Pac. 1125 (1913), contains a particularly convincing delineation of the term "suffer or permit". That case involved a statute making it illegal for children to be "employed, permitted, or suffered," to work in certain operations. The court, pointing out that the words "permit" and "suffer" go farther than the word "employ", said (p. 1129):

> "The inhibition is just as strong and positive against permitting or even suffering a child of this age to do such things as it is against employing him to do them. . . . If the statute went no farther than to prohibit employment, then it could be easily evaded by the claim that . . . he was not employed to do such work, nor was permission given him to do so. But the statute goes farther, and makes use of a term even stronger than the term "permitted". It says that he shall be neither employed, permitted, nor *suffered* to engage in certain works. The relative significance of the words, "permit", "allow", "suffer" is illustrated by Webster under the word "permit", as follows: "To *permit* is more positive, denoting a decided assent, either directly or by im-

> plication. To *allow* is more negative, and imports only acquiescence or abstinence from prevention. To *suffer* is used in cases where our feelings are adverse but we do not think best to resist. . . . Hence, by giving the language of the statute the ordinary meaning and significance which it bears in common usage, it is clear that additional restraints to that of mere employment are placed upon the employer. It means that he shall not *employ* by contract, nor shall he *permit* by acquiescence, nor *suffer* by a failure to hinder. (Italics the Court's).

In *Southern Ry. Co. v. Black*, 127 F. (2d) 280, 281-282, it was held by the Fourth Circuit Court of Appeals that porters in a railroad station were "employees" within the meaning of this Act:

> "The determinative factor is not the source of their compensation, but the fact that they render services which are necessary to the proper running of defendant's station, that they are hired or selected by defendants, and permitted by them to render these services, that they are subject to the general supervision and control of defendants in rendering the services and that the defendants have the power to discharge them".

To the same effect see *Williams v. Jacksonville Terminal Co.*, 315 U. S. 386, at 397-398, in which the company finally conceded that the "red caps" were its employees.

We know of no other cases under the Fair Labor Standards Act involving employees engaged in the distribution of newspapers. However, the decisions under other statutes show that the rackmen should be considered employees under the broad definitions of this Act. First, we refer to certain decisions under the Wagner Act.

In the *Seattle Post-Intelligencer, IX N. L. R. B.*, 1262, 1272-1275, the work was quite similar to that performed in the present case, and the method of compensation was also similar. Moreover, there was an actual "dealer's contract" between the company and the drivers under which the drivers purported to purchase the company's newspapers. The Labor Board held the drivers to be employees in language highly appropriate to the present case:

> "We entertain no doubt that motor route drivers are employees within the legislative intent. Their position is relatively that of employees, generally. The work they perform is a functional part of the business of the newspaper, subject in large measure to the control and right of control of the Company as to manner and mode of execution. Performance concerns not so much the accomplishment of any specified result as continuing operation in close association with the entire enterprise of the Company. The drivers have no real interest in the business and good will represented by the subscription lists; the business and good will are in fact the property of the Company available at any time to its exclusive enjoyment by termination of drivers' contracts. The drivers cannot act as employees or representatives of any competing publisher without the Company's assent but must devote their effort to securing new subscribers for the Company's newspapers. We do not consider the method by which the drivers are compensated as inconsistent with their employee status. In addition to the weekly allowance for car expense and carriage of bundles they receive the difference between the so-called purchase price and the regular subscription price. Inasmuch as the drivers deal only with newspapers delivered to subscribers their return is analogous to earnings measured by the number of subscription deliveries rather than profit from an independent business." p. 1275.

In *Hearst Publications et al. v. National Labor Relations Board*, 136 F. (2d) 608, 610 (certiorari granted, ... U. S. ...), the majority of the Circuit Court of Appeals, in holding that so-called "newsboys" were not employees, relied chiefly on two features of the relationship, both of which do not exist in our case. The Court adverted to the fact that the "newsboys" could sell papers for more than one publisher. It also made much of the fact that the newsboys could buy and sell corners without the approval of the publisher. In the present case, it was stipulated that the rackmen were permitted to deliver respondent's papers only; and petitioners' testimony was uncontradicted that their routes were not assignable. Nevertheless, we feel that this Court will hold the petitioners in the *Hearst Publications* case to be employees, and if under the circumstances of that case, involving a more restricted statute, the workmen are to be considered employees, then *a fortiori* must the petitioners be held to be employees.

Second, we refer the Court to certain decisions under the Unemployment Insurance Laws of the states. In two New York cases, under quite similar fact situations, men engaged in the delivery of newspapers were held to be employees and not independent contractors as contended by the companies. *In re LeValley*, 27 N. Y. S. (2d) 338 (1941); *In re Scatola*, 14 N. Y. S. (2d) 55 (1939), aff'd. 26 N. E. (2d) 815. The same result was reached by the Court of Appeals of Utah under closely related facts. *Salt Lake Tribune Pub. Co. v. Ind. Comm. et al.*, 102 P. (2d) 307 (1940).

Third, the same decision has been announced in tort actions involving distributors of newspapers. *Dispatch Pub. Co. v. Schwenk et al.*, 34 N. E. (2d) 150 (Ind. 1941);

Hampton v. Macon News Printing Co., 12 S. E. (2d) 425 (Ga. 1940).

In the present case, even the District Court felt constrained to point out, apologetically, that "from the standpoint of economic position they would probably be called employees" and that "it may seem grandiose to call the plaintiffs independent contractors". Bearing in mind that "Congress in passing the Act was dealing with economic realities", *Fleming v. Palmer*, 123 F. (2d) 749, 762 (C. C. A. 1), certiorari denied, 316 U. S. 322, the very findings of the District Court suffice to establish that petitioners were employees of respondent within the meaning of Sections 3(d), (e), and (g) of the Act.

2. Petitioner Berry, As Helper of the Schroepfers, Was An Employee of Respondent.

We have already shown that the rackmen required the services of a helper in the performance of their duties of distribution of respondent's papers. We have likewise seen that respondent knew that these helpers were used and that it acquiesced in the practice. Under these circumstances, the helpers must be considered as the employees of respondent.

In *Southern Railway Co. v. Black*, 127 F. (2d) 280, the Railway Company merely selected the head "red caps", who in turn hired the other "red caps". Yet they were all properly held to be employees of the company. Similar considerations apply to the helpers in the present case.

In *Cottrell v. Wetterau Grocer Co., Inc.*, 4 Wage Hour Rept. 482 (U. S. D. C. E. D. Mo. 1941) it was held that a truck driver's helper, employed by the driver with the knowledge of the employer, is an employee of the em-

ployer within the meaning of the Fair Labor Standards Act.

Similar results have been reached by the Courts in construing other statutes of a social nature. Thus in *Hockmith v. Perkins*, 191 S. E. 156 (Ga., 1937), a boy 14 years old, was hired by one of Hockmith's drivers to assist in loading the truck and in making deliveries, and was to be paid by the driver. The employer knew of the arrangement. The Georgia Court held that for the purpose of the Workmen's Compensation Act, Perkins was an employee of Hockmith, for where an employee employs a helper with the knowledge of the employer, the helper is an employee of the employer. The same conclusion was reached in the later Georgia case of *American Mutual Liability Insurance Company v. Harris*, 6 S. E. (2d) 168 (1939), in which a truck driver's helper was injured during the course of the employment. Other cases under Workmen's Compensation laws to the same effect are *Williams v. American Employers' Insurance Co.*, 107 F. (2d) 953 (D. C. App. 1939) and *Michaux v. Gate City Orange Crush Bottling Co.*, 172 S. E. 406 (N. C.)

The same statutory language was involved in *Chattanooga Implement & Mfg. Co. v. Harland*, 239 S. W. 421 (Tenn. 1922), where an operator of a mill was sued for injuries sustained by a minor under a statute making it unlawful "to employ, permit or suffer" any child less than 14 years of age to work in any mill, factory, or workshop. The defendant had never entered into an employment relationship with the minor in the usual sense, but certain of defendant's regular employees had permitted the boy to help them and had paid him out of their own piece-rate wages. The court held defendant liable. "Suffer or permit to work", it concluded, may

not be limited to those situations in which an employer exercises direct supervision and control.

It would certainly be against the policy of the law to permit an employer, such as respondent, to set up an operation in the distribution of its product which it well knows cannot be handled by one man, and absolve itself from responsibility for the payment of substandard wages when that employee employs an assistant to help him in carrying out the instructions of the employer. The Fair Labor Standards Act would afford illusory protection to workers if it could be evaded by such a device. It is true that respondent maintained this arrangement for many years before the passage of the Act, but although the system was not a mere contrivance to avoid the operation of the Act, no vested rights were created thereby and respondent cannot be absolved from responsibility for paying to the helpers the minimum compensation required by the Act.

CONCLUSION.

It is respectfully submitted that this case is one calling for the exercise by this Court of its review jurisdiction under Sec. 240 (a) of the Judicial Code; and that to such an end a writ of certiorari should issue to the U. S. Circuit Court of Appeals for the Fourth Circuit.

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